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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/645,758	08/21/2003	Begum Tamer	67551	8044

48940 7590 03/28/2006

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CHICAGO, IL 60603-3406

EXAMINER
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CHAWLA, JYOTI

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 03/28/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/645,758

Applicant(s)

TAMER ET AL.

Examiner

Jyoti Chawla

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☒ None of:
- 1) ☒ Certified copies of the priority documents have been received.
  - 2) ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - 3) ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |  |
|---|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)            |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>3/24/04, 3/29/04</u> | 6) <input type="checkbox"/> Other: ____  |

## DETAILED ACTION

### *Priority*

1. Acknowledgment is made of applicant's claim for foreign priority based on an application filed in Europe on August 30, 2002. It is noted, however, that applicant has not filed a certified copy of the EPO 02019145.8 application as required by 35 U.S.C. 119(b).

### ***Claim Rejections - 35 USC § 112 (second)***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

4. Claims 3 and 12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

4. Claim 3 recites a confectionary product having the form and dimensions of a regular chocolate bar. Since regular candy bars of each brand or trade name and every manufacturer has different shapes and dimensions that are categorized as regular size as opposed to large or mini, etc., therefore the claim is indefinite Clarification and/or correction are required and without such details the metes and bounds of the patent protection are unclear.

5. To expedite prosecution, a wafer stack of any shape in which a candy bar is made and sold in the market would be considered.

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6. Claim 12 recites a step of blending the wafer batter to a viscosity measured by Ford cup like viscosimeter to a flow out time of at least 39 at a temperature of 18-20<sup>0</sup> C. The claim fails to provide any further detail about the size of the cup and the orifice as well as the proper units in which the viscosity is measured. Therefore the claim language is indefinite and needs clarification. To expedite prosecution, a batter that is capable of making thin wafers that can be filled, stacked and enrobed would be considered.

***Claim Rejections - 35 USC § 102(b)***

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action: A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

8. Claims 1-6, 10-12, 16, and 20 are rejected under 35 U.S.C. 102(b) as being anticipated by Negro (US 4629628).

9. In regards to claims 1-6, 10-12, 16, and 20 Negro teaches a wafer and that can be stacked or filled. Negro teaches wafer with good stability strength, smooth dense surface and can be used as filled wafer with two or more wafer sheets (column 2, lines 18-22) and has organoleptic properties along with delicacy and crispiness (column 1,

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lines 10-21). The wafers taught by Negro are 2.5 to 3 mm thin and can be made by including cocoa powder in the batter preferably about 1.5% by weight. Negro teaches the composition and makes the wafer in the thickness desired by the applicant, the wafer batter would inherently have to have the viscosity recited by the applicant, e.g., if Negro's wafer batter is too thick and sticky (more viscous) then the wafers would turn out to be bulky and thick and plastic, however if the batter taught by Negro is too thin and runny (less viscous), then the wafer product would be extremely thin and breakable and thus not fit for filling and stacking. Therefore, Negro inherently teaches the desired viscosity as recited by the applicant.

10. Negro teaches that wafers are frequently coated with chocolate or other coating compositions (column 1, lines 49-50 and 64-67 and column 2). The wafer recipe taught by Negro comprises of water, flour, salt, vegetable oil, lecithin, bicarbonate, cocoa powder and water (column 2, line 26 to column 5, line 6). Negro specifically teaches a single wafer size of 90mm X 25 mm X 2-5 mm (column 6, Table), which after stacking and filling and coating is the size of a regular candy bar. Negro also teaches thin smooth wafer where two or more sheets that are bonded to one another by filling to make a sandwich (column 1, line 64 to column 2 line 25).

11. Since Negro makes a wafer product containing cocoa powder that may be filled, stacked and enrobed in chocolate and produced in desired thickness range and trimmed to final dimensions appropriate for a candy bar, therefore Negro anticipates claims 1-6, 10-12, 16, and 20 as recited by the applicant.

***Claim Rejections - 35 USC § 103***

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

Determining the scope and contents of the prior art.

Ascertaining the differences between the prior art and the claims at issue.

Resolving the level of ordinary skill in the pertinent art.

Considering objective evidence present in the application indicating obviousness or nonobviousness.

14. Claims 7-9 and 13-15 and 17-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Negro (US 4629628) as applied to claims 1- 6, 10-12 16 and 20 above in view of Technology of biscuits, crackers and cookies, and of Dictionary of Food Ingredients and further in view of Biscuit, Cracker and cookie recipe for the Food Industry.

15. Negro is applied to all the independent claims to which the following claims depend on. Negro teaches wafers with all the ingredients recited by the applicant in claims 7, 13 and 17. The preferred embodiment taught by Negro has water 56%, total flour 38.5% and cocoa powder 1.5% (column 4, lines 55-68), which fall within the recited

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range of the applicant. In regards to the amount of bicarbonate Negro teaches soda amount (sodium bicarbonate and salt of hartshorn) of 0.6%, i.e., 385 grams in about 62 kilograms of batter (recipe II, column 2, lines 55-68), which falls within the recited range of the applicant and in example (column 4) the bicarbonate amount is 0.8%.

16. In regards to the amount of lecithin Negro teaches 0.1-0.2%, e.g., 50 grams in a batter weight of 25 Kilograms approximately equals 0.2% (recipe I-III and Example, columns 2, 3 and 4 respectively), which falls in the recited range of the applicant and according to the Dictionary of Food ingredients the typical usage levels of lecithin as an emulsifier fall between 0.1-1.0 percent (page 83).

17. Negro range of salt addition to the wafer recipe falls between 0.1 to 0.15%, which is lower than the recited range of the applicant. However, salt in a wafer batter is primarily added to enhance the flavor (Technology of biscuits, crackers and cookies, page 295), therefore adding salt in slightly different amounts in order obtain the desired flavor, would be considered as art recognized variable and applicant's intended function would have been obvious.

18. In regards to the amount of vegetable oil the percentage taught by Negro is 200 grams in batter of 62 Kilograms approximately, i.e., 0.32%(column 2, lines 55-67), 50 grams in 25 kilograms batter, i.e., 0.2% (column 3, lines1-14) and 24 grams in 1 kilogram, i.e., 2.4%. Therefore the range taught by Negro covers the range recited by the applicant.

19. Since Negro teaches all the ingredients in the recited range except for the amount of salt, therefore, it would have been obvious to the one with ordinary skill in the

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art at the time of the invention to modify Negro and add more salt in the wafer recipe to enhance the flavoring to the desired level as salt, sugar and cocoa powder in a primarily bland wafer batter stabilize and enhances the flavor and provide a longer shelf life.

20. Claims 8-9, 14-15 and 18-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Negro (US 4629628) as applied to claims 1- 6, 10-12, 16 and 20 above in view of Technology of biscuits, crackers and cookies, and of Dictionary of Food Ingredients and further in view of Biscuit , Cracker and cookie recipe for the Food Industry further in view of Moore et al (US 5258199) and further in view of Tresser (US 4396633).

21. Negro is applied to all the independent claims to which the following claims depend on. In regards to claims 8,9, 14,15, 18 and 19 Negro teaches a cocoa powder amount of 1.5% by weight which falls out of the recited range of the applicant in the above mentioned claims.

22. In regards to the above mentioned claims 8, 9, 14, 15, 18 and 19 Moore teaches a chocolate flavored confection comprising of minor amounts of defatted cocoa powder (column 1, lines 35-45) and further clarifies that minor means less than about 50% by weight of the confection (column 2, lines 24-27). Moore also teaches that the amount of cocoa will typically vary from 1-10% by weight (column 6, lines 9-16), which satisfies all the ranges for cocoa powder recited by the applicant in claims 6-9, 13-15 and 17-19.

23. Further, in regards to the above mentioned claims 8,14 and 18 Tresser teaches a confectionary product, a wafer with separate fatty coating to hold the ice cream. The



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wafer composition contains cocoa powder in the range of 5.1-16.3%(column 10, lines 40-50 table for example 5) and, which falls within the range specified by the applicant in claims 8, 9, 14, 15 , 18 and 19 respectively.

24. Therefore, it would have been obvious to the one skilled in the art at the time of the invention, to modify Negro and add a little more cocoa powder based on the teachings from either Moore or Tresser in order to satisfy the range recited by the applicant depending on the level of color desired in the wafer and level of cocoa flavor desired and also depending on the particular type of cocoa chosen to make the wafer product.

***Remarks/ Conclusion***

25. It is well known to make wafers stacks with cream filing and then enrobing the wafer books/stacks in chocolate and the prior art indicates that. Therefore, the prior art made of record as part of USPTO form 892 contains references that have not been relied upon in this office action but are considered pertinent to applicant's disclosure.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Chawla whose telephone number is (571) 272-8212. The examiner can normally be reached on 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.


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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Jyoti Chawla  
Examiner  
Art Unit 1761

  
3/8/06

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